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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **TACOMA DIVISION**

11 JOHN DOE #1, an individual, JOHN DOE #2,
12 an individual, and PROTECT MARRIAGE
WASHINGTON,

13 Plaintiffs,

14 vs.

15 SAM REED, in his official capacity as
16 Secretary of State of Washington, BRENDA
GALARZA, in her official capacity as Public
Records Officer for the Secretary of State of
Washington,

17 Defendants.
18

No. 3:09-CV-05456-BHS

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PROTECTIVE
ORDER AND MEMORANDUM IN
SUPPORT THEREOF**

NOTE ON MOTION CALENDAR:
September 3, 2009 at 2:30 P.M.

The Honorable Benjamin H. Settle

ORAL ARGUMENT REQUESTED

19
20 TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

21 YOU ARE HEREBY GIVEN NOTICE THAT on September 3, 2009, at 2:30 P.M. before
22 the Honorable Judge Benjamin H. Settle, at the United States District Court for the Western
23 District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington,
24 98402, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby
25 do move for a protective order and for leave to file documents under seal.

26 This motion for protective order and for leave to file documents under seal is made pursuant
27 to Fed. R. Civ. P. 5.2(e), Fed. R. Civ. P. 26(c) and Local Rules W.D. Wash. CR 5(g), and on the
28 grounds specified in this notice of motion and motion, Plaintiffs' Memorandum in Support

**Plaintiffs' Notice of Motion and
Motion for Protective Order
(No. 3:09-CV-05456-BHS)**

1

**BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434**

1 Thereof, incorporated into this notice of motion and motion, the declarations filed in support
2 Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, the Verified
3 Complaint, and such other and further evidence as may be presented to the Court at the time of
4 the hearing.

5 Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington respectfully move
6 this Court for an Order:

7 (1) Granting Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington leave
8 to file under seal any declaration of a(n):

9 (a) individual that signed the Referendum 71 petition;

10 (b) individual or organization that supported the Referendum 71 petition process;

11 (c) individual or organization that is a member of, or contributor to, Protect Marriage
12 Washington;

13 (d) individual or organization that opposes Referendum 71;

14 (e) individual or organization that supports a traditional definition of marriage.

15 (2) Granting Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington leave
16 to redact any personal information from any and all filings not filed under seal that
17 could be used to identify a(n):

18 (a) individual that signed the Referendum 71 petition;

19 (b) individual or organization that supported the Referendum 71 petition process;

20 (c) individual or organization that is a member of, or contributor to, Protect Marriage
21 Washington;

22 (d) individual or organization that opposes Referendum 71;

23 (e) individual or organization that supports a traditional definition of marriage.

24 (3) Granting Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington leave
25 to file an additional unredacted copy under seal, if the Court so desires, of any document
26 that is redacted pursuant to FRCP 5.2(f), or in the alternative, leave to file a reference
27 list under seal pursuant to FRCP 5.2(g);

28 (4) Prohibiting Defendants, their agents, servants, employees, officials, or any other person

1 acting in concert with them or on their behalf, from revealing the name of any:

2 (a) individual that signed the Referendum 71 petition;

3 (b) individual or organization that supported the Referendum 71 petition process;

4 (c) individual or organization that is a member of, or contributor to, Protect Marriage
5 Washington;

6 (d) individual or organization that opposes Referendum 71;

7 (e) individual or organization that supports a traditional definition of marriage.

8 In support of Plaintiffs' Motion for Protective Order and Leave to File Documents Under
9 Seal, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington state as follows:

10 INTRODUCTION

11 Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington seek preliminary and
12 permanent injunctive relief to prevent Defendant Sam Reed, Secretary of State for the State of
13 Washington, and Defendant Debra Galarza, the Public Records Officer for the Secretary of State
14 of Washington, from releasing copies of the Referendum 71 petition pursuant to the Washington
15 Public Records Act, Wash. Rev. Code § 42.56.001, or otherwise.

16 Plaintiffs seek a protective order to prevent the public release of any information that could
17 be used to identify: (1) an individual that signed the Referendum 71 petition; (2) an individual or
18 organization that supported the Referendum 71 petition process; (3) an individual or organization
19 that is a member of, or contributor to, Protect Marriage Washington; (4) an individual or
20 organization that opposes Referendum 71; and (5) an individual or organization that supports a
21 traditional definition of marriage.

22 Defendants and members of the public do not have an absolute right to access or publish
23 materials filed with the court and protection is warranted in this case given the nature of
24 Plaintiffs' claims. Plaintiffs allege that the Washington Public Records Act, Wash. Rev. Code
25 42.42.56.001 *et seq.*, is unconstitutional as applied to referendum petitions in that the statute is
26 not narrowly tailored to serve a compelling government interest in violation of the First
27 Amendment of the United States Constitution. Given that Plaintiffs' allegation is that the State
28 lacks an interest in public disclosure, forcing Plaintiffs to reveal the names of petition signers

1 through these proceedings would result in a nullification of the very right Plaintiffs are trying to
 2 assert. *See NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (holding that a judicial rule that
 3 required an individual to identify himself in order to assert his First Amendment rights “would
 4 result in a nullification of the right at the very moment of its assertion”).

5 Furthermore, Plaintiffs raise the alternative argument that, even if the Public Records Act, as
 6 applied to referendum petitions, is narrowly tailored to serve a compelling government interest, it
 7 remains unconstitutional as applied to the Referendum 71 petition because there is a reasonable
 8 probability that disclosure will result in threats, harassment, and reprisals directed at those
 9 individuals who support a traditional definition of marriage. Here, the need to protect the identity
 10 of individuals participating in this suit is much broader than the class of petition signers because
 11 the threats, harassments, and reprisals have been directed at any individual supporting a
 12 traditional definition of marriage, namely between one man and one woman.

13 Because Plaintiffs anticipate that some or all of the documents filed under seal will be used
 14 in dispositive motions, Plaintiffs respectfully request that the Court enter a finding that a
 15 compelling justification exists to redact identifying information from public filings and for the
 16 filing of unredacted versions under seal.

17 ARGUMENT

18 **I. The public does not have an absolute right to obtain the 19 information that Plaintiffs seek to redact and file under seal.**

20 In the Ninth Circuit, there is a “strong presumption in favor of access to court records.”
 21 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This presumption
 22 flows from the common law right “to inspect and copy public records and documents.” *Nixon v.*
 23 *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). However, the common law right of
 24 access is not absolute and “can be overridden given sufficiently compelling reasons for doing
 25 so.” *Foltz*, 331 F.3d at 1135. In determining whether compelling justification exists, the courts
 26 should consider all factors, including:

27 the public interest in understanding the judicial process and whether disclosure of the
 28 material could result in *improper use* of the material for scandalous or libelous purposes
 or infringement upon trade secrets. . . . After taking all relevant factors into
 consideration, the district court must base its decision on a compelling reason and

1 articulate the factual basis for its ruling, without relying on hypothesis or conjecture.
 2 *Id.* (emphasis added); *see also, Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179
 3 (9th Cir. 2006) (emphasis added). “[C]ompelling reasons’ sufficient to outweigh the public’s
 4 interest in disclosure and justify sealing court records exist when such ‘court files might have
 5 become a vehicle for improper purposes,’ such as the use of records to *gratify private spite*,
 6 promote public scandal, circulate libelous statements, or release trade secrets.” *Id.* (citing *Nixon*
 7 *v. Warner Communications*, 435 U.S. at 598) (emphasis added). Thus, the Ninth Circuit standard,
 8 at least with respect to documents attached to dispositive motions, requires the court to balance
 9 the “competing interests of the public and the party who seeks to keep certain judicial records
 10 secret.”¹ *Kamakana*, 447 F.3d at 1179.

11 **II. The balance tips decidedly in favor of Plaintiffs.**

12 This case differs in significant respect from the typical case where a party is seeking leave to
 13 file documents under seal. The very essence of Plaintiffs’ case is whether Washington possesses
 14 an interest sufficient to justify the public disclosure of a referendum petition, and then even if it
 15 has such an interest, whether Plaintiffs are nevertheless entitled to an exemption from that
 16 disclosure because of the animosity directed at supporters of the Referendum 71 petition process
 17 and a traditional definition of marriage. Thus, if Plaintiffs are not permitted to redact personal
 18 information from their filings likely to lead to the identification individuals and organizations
 19 associated with Plaintiffs, the Referendum 71 petition, and a traditional definition of marriage,
 20 the Court in many respects will allow the very harm that Plaintiffs seek to redress through this
 21 suit. That is, unless this Court permits Plaintiffs to redact identifying information from their
 22 public filings, there is no meaningful way for Plaintiffs to assert their First Amendment rights
 23 without first suffering the harm of public disclosure.

24 The Supreme Court has repeatedly held that “compelled disclosure, in itself, can seriously
 25

26 ¹ For discovery materials attached to non-dispositive motions, the party seeking leave to file under seal need
 27 only present “good cause.” *See Kamakana*, 447 F.3d at 1179-80; Federal Rule of Civil Procedure 26(c). Because
 28 Plaintiffs are seeking a protective order under Rule 5.2(e), and because Plaintiffs anticipate that many of these
 documents will eventually be attached to dispositive motions, Plaintiffs ask this court to make a finding under the
 higher “compelling justification” standard.

1 infringe on privacy of association and belief guaranteed by the First Amendment.” *Davis v.*
 2 *F.E.C.*, 128 S. Ct. 2759, 2774-75 (2008) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976);
 3 “[C]ompelled disclosure . . . cannot be justified by a mere showing of some legitimate
 4 government interest. . . . [It] must survive exacting scrutiny.” *Id.* “The loss of First Amendment
 5 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”
 6 *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit*
 7 *Authority*, 163 F.3d 341, 363 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

8 As set forth in greater detail in Plaintiffs’ Memorandum in Support of Motion for Temporary
 9 Restraining Order and Preliminary Injunction, the Public Records Act violates Plaintiffs’ First
 10 Amendment rights because it is not narrowly tailored to serve a compelling government interest.
 11 Furthermore, even if the Public Records Act is narrowly tailored to serve a compelling
 12 government interest, the Referendum 71 petition is exempt from disclosure pursuant to that
 13 statute because there is a reasonable probability of threats, harassment, and reprisals. *See Buckley*
 14 *v. Valeo*, 424 U.S. at 71 (noting that there may be a case where the First Amendment harms that
 15 result from compelled disclosure exceed the state’s interest and setting forth the standard for a
 16 blanket exemption); *Brown v. Socialist Workers ‘74 Campaign Committee (Ohio)*, 459 U.S. 87
 17 (1982) (applying the standard set forth in *Buckley* and granting blanket exemption). Indeed,
 18 Washington State officials have expressed some concern that the Public Records Act will be used
 19 for illegitimate purposes. *See* (Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim.
 20 Inj., Ex. 1, p. 1 (“State Elections Director Nick Handy notes the [sic] the state has long been
 21 committed to open records and transparency in government, but says he’s unhappy with the
 22 though of the petition process being used as a weapon to dampen voters’ participation in their
 23 constitutional right of petition.”). Based upon the harassment directed at individuals and
 24 organizations involved in the Referendum 71 petition process, as well as evidence of threats,
 25 harassment, and reprisals directed at individuals and organizations supporting a traditional
 26 definition of marriage across the United States, there is ample reason to believe that any
 27 individual identified in this suit will be subjected to similar threats and harassment. In the current
 28 contentious environment, it is unconscionable to ask any individual to come forward knowing

1 that his or her identity will be made available to the same individuals seeking to publish the
2 names of the petition signers.

3 As the Supreme Court cautioned in *Nixon v. Warner Communications*, 435 U.S. at 598, the
4 public right to “inspect and copy judicial records is not absolute.” The court must use its
5 supervisory power over its own records to ensure that its records are not used to “gratify private
6 spite.” *Id.* Here, there is a very realistic possibility that any individual identified in documents
7 filed with the court will be targeted for his or her support of the Referendum 71 petition process
8 and a traditional definition of marriage. The use of court documents to harass petition signers and
9 individuals associated with a traditional definition of marriage is exactly the type of “improper
10 use” that the Supreme Court contemplated in *Nixon. Id.* Thus, the potential harm to Plaintiffs and
11 their supporters is great if they are not allowed to redact personal identifying information from
12 their public filings with this Court.

13 Conversely, allowing Plaintiffs to redact personal identifying information and to file
14 unredacted copies of the documents with the court under seal places only a marginal restriction
15 on the public’s right of access. The redacted versions of documents filed with the court will be
16 virtually identical to those filed under seal. Plaintiffs seek only to replace the names of
17 individuals with unique pseudonyms, such as John Doe #X, and to remove other unique
18 identifying information, such as addresses and employer information, that could lead to the
19 identification of a supporter of the Referendum 71 petition and a traditional definition of
20 marriage. Furthermore, Plaintiffs are prepared to file unredacted versions under seal provided an
21 appropriate protective order is issued to protect the identities of these individuals.

22 Therefore, the harm to Plaintiffs that would occur if the protective order is not granted
23 greatly exceeds the burden on the public’s right to access and compelling justification exists to
24 warrant the protection sought in Plaintiffs’ Motion for Protective Order.

25 Finally, because of the complex constitutional issues involved here, Plaintiffs believe that
26 oral argument would be helpful to the Court in determining whether a protective order should
27 issue, and therefore request oral argument.

28 Dated this 3rd day of August, 2009.

1 Respectfully submitted,

2 /s/ Sarah E. Troupis

3 James Bopp, Jr. (Ind. Bar No. 2838-84)*
4 Sarah E. Troupis (Wis. Bar No. 1061515)*
5 Scott F. Bieniek (Ill. Bar No. 6295901)*
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11 *Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I, Sarah E. Troupis, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On August 3, 2009, I electronically filed the foregoing document described as Plaintiffs' Notice of Motion and Motion for Protective Order and Memorandum in Support Thereof with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

James K. Pharris
jamesp@atg.wa.gov
Counsel for Defendants Sam Reed and Brenda Galarza

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 3rd day of August, 2009.

/s/ Sarah E. Troupis
Sarah E. Troupis
Counsel for All Plaintiffs